Editor's note: 95 I.D. 1

HIKO BELL MINING & OIL CO., ET AL. (ON RECONSIDERATION)

IBLA 85-102, IBLA 85-103, IBLA 85-104, and IBLA 85-105 — Decided January 15, 1988

Petition for reconsideration of the Board's decision in Hiko Bell Mining & Oil Co., 93 IBLA 143 (1986).

Petition granted; prior decision sustained as modified.

1. Oil and Gas Leases: Discovery--Oil and Gas Leases: Expiration--Oil and Gas Leases: Extensions--Oil and Gas Leases: Production--Oil and Gas Leases: Unit and Cooperative Agreements--Words and Phrases

   "Production." Under 30 U.S.C. § 226(j) (1982), an oil and gas lease committed to a unit or cooperative agreement shall continue in force and effect so long as the lease remains subject to the plan, provided that "production is had in paying quantities under the plan prior to the expiration date of the term of such lease." In 1954, Congress substituted the "production" requirement for the prior requirement for a "discovery," and enacted a separate provision for the tenure of a lease on which there was no actual production but only a well capable of production.

2. Oil and Gas Leases: Expiration--Oil and Gas Leases: Extensions--Oil and Gas Leases: Production--Oil and Gas Leases: Unit and Cooperative Agreements

   Under 30 U.S.C. § 226(f) and (j) (1982), a unitized oil and gas lease will not expire for lack of production at the end of its term if there is a unit well capable of

producing oil or gas in paying quantities. Such a well must be in physical condition to produce and is not in such condition if the casing has not been perforated.

3. Administrative Authority: Estoppel--Estoppel--Federal Employees and Officers: Authority to Bind Government--Oil and Gas Leases: Extensions

A lessee's reliance upon the erroneous statements of a BLM employee does not estop the Department from denying an extension of an oil and gas lease if the lease did not qualify for an extension under the Mineral Leasing Act.

APPEARANCES: Robert E. Musgraves, Esq., and Wayne F. Forman, Esq., for the Dirty Devil Limited Partnership; Dwight I. Bliss, Esq., C. M. Peterson, Esq., and Laura Payne, Esq., Denver, Colorado, for other petitioners; David K. Grayson, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

In Hiko Bell Mining & Oil Co., 93 IBLA 143 (1986), we affirmed a decision by the Utah State Office, Bureau of Land Management (BLM), declaring that certain oil and gas leases 1/ had terminated effective August 16, 1984,

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1/ These leases are:

IBLA Docket No.	Appellant	Lease No.
85-102	Hiko Bell Mining & Oil Co.	U-14233
85-103	Natural Gas Corporation of California	U-9215 and U-13370
85-104	Sheridan McGarry	U-23265
85-105	Natural Gas Corporation of California and Enserch Exploration, Inc.	U-0148651, U-148653-A U-1206, U-2557, U-3443, U-14656, U-23156, U-23282, and U-38433

because production was not established within the Dirty Devil unit area prior to that date. Petitions for reconsideration of this decision have been filed by the appellants in the case and the Dirty Devil Limited Partnership (Dirty Devil). 2/ Each lease was within the Dirty Devil unit at the time of its expiration. All of the leases had a common expiration date because they received the same 2-year extension upon elimination from a prior unit effective August 16, 1982. Appellants, however, had contended that they had discovered gas in paying quantities under the Dirty Devil unit plan prior to lease expiration, and that such discovery was sufficient to extend the leases pursuant to the following provision of 30 U.S.C. § 226(j) (1982):

> Any other lease [other than one for a term of 20 years] issued under any section of this chapter which has heretofore or may hereafter be committed to any such [unit] plan that contains a general provision for allocation of oil or gas shall continue in force and effect as to the land committed so long as the lease remains subject to the plan: Provided, That production is had in paying quantities under the plan prior to the expiration date of the term of such lease. [Emphasis supplied.]

This language, they argued, should be interpreted differently than that of 30 U.S.C. § 226(e) (1982), which provides that an individual lease "shall continue so long after its primary term as oil or gas is produced in paying quantities." (Emphasis added.)

2/ On Aug. 27, 1986, the Board received a petition for reconsideration of the Hiko Bell decision filed by Dwight I. Bliss and C. M. Peterson on behalf of all the appellants in the consolidated appeal. By letter dated Sept. 4, 1986, the Board was informed that the Dirty Devil Limited Partnership had acquired all of Hiko Bell's interest in the leases involved in the appeal, and the Board allowed Dirty Devil to file a separate petition.

The essential facts were set forth in our prior decision as follows:

> [T]he initial Dirty Devil unit obligation well, the Dirty Devil 22-27, * * * was commenced on August 5, 1984, and reached a total depth of 4,377 feet on August 8. On that same day, the well had a "substantial gas kick," appellants state, and seven stands of drill pipe were removed from the hole. Well reports show that the well flowed gas through its safety manifold at the rate of 2.475 MMCFGPD (Exh. 2 to appellant's statement of reasons). Appellants observe that on subsequent days the gas flow continued and the operator attempted to "kill" the well so that casing could be run. Casing was eventually run on August 15 and 16, and electric logs were also run. Finally on August 17, 1984, at 0230 hours, four intervals of the Wasatch formation were perforated and the rig was released at 9 a.m. that day.
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> Appellants acknowledge that the Dirty Devil 22-27 was not physically capable of producing at midnight on August 16, 1984, but contend, nevertheless, that the well had discovered gas in paying quantities under the Dirty Devil unit plan prior to lease expiration. Gas production was achieved on August 8, appellants state, and this production continued until the well was killed. Drilling reports reflect that gas was flared on August 13 and 15. In the opinion of Robert E. Covington, an officer of and geologist for Hiko Bell Mining and Oil Company, the recovery of natural gas during drilling, the evaluation of electric logs, and other data prior to August 17, 1984, clearly reflected that subsequent sustained production would confirm that the well was capable of producing gas in paying quantities under the unit agreement. Appellants argue, therefore, that their leases were entitled to an extension under 30 U.S.C. § 226(j) (1982), regulation 43 CFR 3107.3, and article 18(e) of the unit agreement. [Emphasis in original.]

93 IBLA at 144.

Citing Yates Petroleum Corp., 67 IBLA 246, 89 I.D. 480 (1982), we rejected appellants' argument that extension of a lease subject to a unit agreement should be governed by a different standard than an individual lease:

> For purposes of an extension under section 17(j) [30 U.S.C. § 226(j) (1982)], a well subject to a unit agreement must be capable of producing sufficient hydrocarbons to recover the costs of operating and marketing, but need not recoup the cost of drilling. Id. at 258, 89 I.D. at 487. An identical standard applies to an extension of an individual lease at the end of its primary term.

93 IBLA at 145. We affirmed BLM's determination that the leases expired and were not extended by virtue of section 226(j).

Petitioner Dirty Devil contends that the "production is had" language of section 226(j) is ambiguous, and that we should interpret it in accordance with congressional intent in enacting it in 1954 to encourage exploration and development of oil and gas; that our decision would discourage exploration and production activity during the later months of unitized oil and gas leases; that requiring the well casing to be in place and perforated before the lease expires in order to extend its term will encourage "slap-dash" measures that might not be in the best interests of safety or conservation; and that our previous decision ignores several references to "discovery" in the Dirty Devil Unit Agreement. The other petitioners contend in addition that Yates construed only the meaning of "in paying quantities" as the same for purposes of subsections 226(e) and (j) and that the Yates decision itself provides a reason for a more liberal standard for extending a lease in a unit than an individual lease, namely, that the holder of a unitized lease surrenders his exclusive right to drill on his lease in favor of the coordinated drilling plan authorized under the unit agreement.

BLM responds that the Department has historically required, for both individual leases and leases subject to a unit agreement, "that before a finding of production in paying quantities on a well may be found, the well must be drilled, cemented, perforated, and tested positively for oil and gas." BLM contends that the language of section 226(j) is not ambiguous and that the legislative history does not support interpreting it differently from section 226(e). BLM points out that the deadline for achieving production is statutory and may not be varied by the terms of a unit agreement or waived by the Department. Finally, BLM argues that petitioners have provided no substitute for the current rule that production in paying quantities be proved by the drilling of a well which is cemented and perforated and shows the presence of oil or gas in paying quantities. To this, Dirty Devil replies:

> [W]here a well hole is completely drilled and the well is physically demonstrated to be capable of producing gas in paying quantities, the requisites of § 226(j) are met for purposes of obtaining an extension under that provision without regard to the question of whether or not the well has been cased and perforated.

Reply in Support of Petition for Reconsideration filed June 11, 1987, at 6. It refers to this as an "open hole test" or an "open well test." Id.

We will discuss petitioners' arguments seriatim.

Dirty Devil argues that to construe 30 U.S.C. § 226(j) (1982) to require production instead of discovery would be contrary to the intent of Congress as evidenced by the legislative history of the amendments to the Mineral Leasing Act made by the Act of July 29, 1954, ch. 644, 68 Stat. 583, and cites various portions of H.R. Rep. No. 2238, 83d Cong., 2d Sess. (1954), reprinted in

1954 U.S. Code Cong. & Ad. News 2695-2704. BLM contends that the language of the statute is unambiguous and does not require examination of its legislative history.

The Supreme Court has considered the "plain language" of statutes in recent decisions construing public lands legislation:

> Although language seldom attains the precision of a mathematical symbol, where an expression is capable of precise definition, we will give effect to that meaning absent strong evidence that Congress actually intended another meaning. "[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" United States v. Locke, 471 U.S. 84, 95 . . . (1985) (quoting Richards v. United States, 369 U.S. 1, 9 . . . (1962)).

AMOCO Production Co. v. Village of Gambell, Alaska, ___ U.S. ___, 107 S. Ct. 1396, 1406 (1987); United States v. Locke, 471 U.S. 84, 95-96 (1985). In these cases the Court also examined the legislative history of the statutes involved and determined that "nothing in the Act's structure or relationship to other statutes calls into question this plain meaning." AMOCO Production Co. v. Village of Gambell, Alaska, supra, at 1408. 3/ The petitions for reconsideration in this case similarly require us to examine the structure of the Mineral Leasing Act and to construe the provision under consideration along with related provisions. Further, we must reconcile differences between the language of section 226(j) and some of its legislative history.

3/ The Court's approach to statutory interpretation in this regard is similar to that employed by Chief Justice John Marshall in United States v. Fisher, 2 Cranch (6 U.S.) 358 (1804).

In Celsius Energy Co., 99 IBLA 53, 69, 94 I.D. 394, 403 (1987), we recently restated our principle for construing the provisions of 30 U.S.C. § 226(j) (1982): "[T]here can be no departure from the text of the statute in order to apply 'the policy in favor of unitization' without careful examination of what Congress intended when it enacted the specific provision pertaining to a particular event affecting the tenure of a lease." In Celsius we were required to consider in the context of a different issue the same legislative history cited by Dirty Devil in its petition. In Celsius, as in this case, we were confronted with language in this Department's report on proposed amendments to the Mineral Leasing Act which differed from the text of the amendments which was also drafted by the Department. We observed:

> Although the emphasized language was not part of the statutory text proposed by the Department, it nevertheless describes the intended meaning and effect of the proposed statutory language which Congress adopted verbatim when it enacted the statute into law. * * * Although the emphasized language appears only in the Interior Department's report, this report was appended to the House Report, and courts have generally accepted such appended reports and letters from officials of this Department as evidence of legislative intent. See e.g., Watt v. Western Nuclear, Inc., 462 U.S. 36, 50, 55-56 (1983); Utah Power & Light Co. v. United States, 243 U.S. 389, 407 n.1 (1917); United States v. Union Oil Co., 549 F.2d 1271, 1277 (9th Cir.), cert. denied sub nom. Ottoboni v. United States, 434 U.S. 930 (1977). So has this Board. E.g., Western Nuclear, Inc., 35 IBLA 146, 157, 85 I.D. 129, 135 (1978), aff'd, Watt v. Western Nuclear, Inc., supra; Cecil A. Walker, 26 IBLA 71, 76 (1976). Inasmuch as such reports represent views of senior officials of this Department which served as the basis for legislative action, this Board is not generally disposed to apply enacted legislation in a manner inconsistent with such statements. Id. Such a conclusion is especially compelling where, as here, Congress enacted verbatim the statutory language proposed by the agency. [Emphasis in original.]

99 IBLA at 76-77, 94 I.D. at 407-08.

Nevertheless, we also recognized in Celsius we could not totally disregard the text of the statute and substitute the legislative history in its place. In fact, we declined to give full effect to the language of the legislative history over the language of the statute. Instead, we chose to give the word being construed in that decision the same meaning it had when it was used elsewhere in the statute. The same methodology may legitimately be used here: in addition to examining the legislative history of section 226(j), we will consider the use of the word "production" elsewhere in the Act as an aid to ascertaining its meaning in this case. 4/

It is important to recognize that the pertinent language of the provision in 30 U.S.C. § 226(j) (1982) was amended once after it was originally enacted. On several occasions, this Board has examined the evolution of statutory provisions pertaining to unit agreements, starting with the enactment of the first measure establishing temporary authority for approving unit agreements in 1930. See Celsius Energy Co., supra; Anne Burnett Tandy, 33 IBLA 106, 109-10 (1977). For the purposes of this case, it is sufficient to note that, prior to 1946, only 20-year leases could enjoy extension beyond

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4/ Had we looked merely to the legislative history in Celsius, we might have been led to the conclusion that there were no circumstances under which a nonunitized portion of a lease segregated by partial commitment to a unit can be extended by production from the unitized portion. Instead, we held that when a lease is segregated upon partial committment to a unit agreement pursuant to 30 U.S.C. § 226(j) (1982), production on the unitized portion can extend production on the nonunitized portion if the segregation occurs when the base lease is in an extended term because of production, but not if such lease is in a fixed term of years. In reaching this conclusion, we were called upon to construe the word "term" as it appears in 30 U.S.C. § 226(j) (1982), and we concluded that the most authoritative construction of the word could be achieved by comparing it with other uses of the word in the text of the statute.

their terms for the life of the unit. No other leases could be extended pursuant to this provision. Leases with primary terms of 5 years could be extended by production, and if such a lease was allocated production from a producing unit, the lease was considered to be extended by production under the provisions of the individual lease, not by any statutory provision relating to unitized leases. See General Petroleum Corp., 59 I.D. 383, 387 (1947).

By section 5 of the Act of August 8, 1946, P.L. 696, 60 Stat. 953 (1946), however, Congress provided, as the second sentence of the fourth paragraph of section 17(b), that leases other than 20-year leases could be extended by virtue of their commitment to a unit plan:

> Any other lease [other than a 20-year lease] issued under any section of this Act which is committed to any such plan that contains a general provision for allocation of oil or gas shall continue in force and effect as to the land committed so long as the lease remains subject to the plan, provided oil or gas is discovered under the plan prior to the expiration date of the primary term of such lease. [Emphasis added.]

The Department's report on the bill that became P.L. 79-696, S. 1236, stated:

> There is no specific provision either in the present law or in the bill which expressly provides for the extension of 5- and 10-year leases which have been committed to any such plan upon which a discovery has been made. In my opinion, any leases which are committed to a unit or cooperative plan should be given a like extension provided that oil and gas is being produced from some part of the unitized area. In fact, the Department has been following the practice of recognizing such extensions. The proposed substitute has been so drafted as to expressly sanction this practice (sec. 17(b)). [Emphasis added.]

Report of the Department of the Interior to the Senate Committee on Public Lands and Surveys, S. Rep. No. 1392, 79th Cong., 2d Sess., at 10.

Although this report recommended both extending leases "committed to any * * * plan upon which a discovery has been made" and doing so "provided that oil and gas is being produced from some part of the unitized area," it was the former alternative that made its way into the 1946 Act. (Emphasis supplied.)

The 1946 statute, however, posed one particular difficulty. At that time, individual leases were issued for primary terms of 5 years and were eligible for extension for 5-year secondary terms. If such a lease were committed to a unit but the discovery of oil and gas under a unit agreement did not occur until after the primary term of the lease, the lease could not be extended by the above-quoted provision. This problem was identified by the industry, which sought to change the legislation:

> Coming now to the fourth amendment to S. 2380, it touches upon a problem which many unit operators have faced in the Rocky Mountain region where again, under a departmental interpretation of the expression "primary term," they have limited it to mean the first 5 years of a noncompetitive lease, so that in order to keep a 5-year noncompetitive lease alive under a unit plan, there must be discovery under the unit plan within the first 5 years of the lease. This placed that particular type of lease at a disadvantage with other types of committed leases which are kept alive by virtue of production in the unit at any time.
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> Of course, that resulted in great operating difficulties when you had, for example, a 5-year noncompetitive lease in its secondary term and you attempted to unitize that lease and you found you couldn't keep it alive by unitization.

> It is a technical problem, but it is one we have encountered many times in the Rocky Mountains.

To amend the Mineral Leasing Act: Hearing before the Subcom. on Public Lands of the Senate Comm. on Interior and Insular Affairs on S. 2380, S. 2381, and S. 2382, 83d Cong., 2d Sess. 22 (1954) (Statement of Howard M. Gullickson, Chairman, Legal Committee, Rocky Mountain Oil and Gas Association) (hereinafter Hearing).

Senator Frank A. Barrett of Wyoming introduced a bill which would have amended the 1946 provision simply by striking out "of the primary term." S. 2382, 83rd Cong., 1st Sess. (1953), reprinted in Hearing, supra at 2. Thus, Senator Barrett's bill would have retained the discovery standard established by the 1946 Act. However, Senator Barrett explained that the Assistant Secretary of the Interior made a report on S. 2380 and S. 2382 (dated April 20, 1954), "and recommended many changes in the bills, as introduced. He also recommended a proposed substitute consolidating the two bills." Hearing, supra at 2. This report subscribed to the objective of S. 2382, described the limitation of the existing law, and discussed one of the amendments proposed by the Department, as follows:

> My Dear Senator Butler: This is in reply to the request of your committee for a report on S. 2380, a bill to amend section 17 of the Mineral Leasing Act of February 25, 1920, as amended, and on S. 2382, a bill to amend section 17b of the Mineral Leasing Act of February 25, 1920, as amended, in order to promote the development of oil and gas on the public domain.
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> I fully agree with the objectives of both of these bills, but believe they should be consolidated into a single bill, and

with certain amendments, I recommend the enactment of such a consolidated bill.

These bills would encourage exploration and development for oil and gas on the public-domain lands by liberalizing the provisions of the Mineral Leasing Act as to the extension of oil and gas leases.

* * * * * * *

(4) Section 17 (b), paragraph 4, sentence 2.--S. 2382 would provide for extension of any oil or gas lease which is committed to a cooperative or unit plan of development for operation of an oil or gas pool. At present, any lease other than a 20-year term lease may be extended only if oil and gas is discovered under the plan during the primary term of the lease.

There is no reason to limit the extension privilege to the case where discovery is made during the primary term of the lease. Since the rights of individual leaseholders to drill on leases committed to a plan are severely curtailed, none of them should be penalized because of necessary delays in obtaining production from the unit area. The enactment of this legislation would not delay development since unit plans have their own development requirements. In fact, these requirements are intended to be substituted for, and they customarily are far more rigorous than those contained in the individual leases. The amendment proposed in this report would provide for segregation of any portion of a lease not committed to the plan and for continuance of such a segregated lease for at least 2 years after segregation and so long thereafter as oil or gas is produced in paying quantities on the segregated portion of the lease. [Emphasis supplied.]

Hearing, supra at 2-4.

The language of the proposed substitute bill combining S. 2380 and S. 2382 contained an amendment revising the proviso in the second sentence of the fourth paragraph of section 17(b), however, as emphasized below:

(4) Strike out the second sentence of the fourth paragraph of section 17 (b) and insert in lieu thereof the following language:

> Any other lease under any section of this Act which has heretofore or may hereafter be committed to any such plan that contains a general provision for allocation of oil and gas, shall continue in force and effect as to the land committed, so long as the lease remains subject to the plan: Provided, That production is had in paying quantities under the plan prior to the expiration date of the term of such lease. Any lease hereafter committed to any such plan embracing lands that are in part within and in part outside of the area covered by any such plan shall be segregated into separate leases as to the lands committed and the lands not committed as of the effective date of unitization: Provided, however, That any such lease as to the non-unitized portion shall continue in force and effect for the term thereof but for not less than 2 years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities. [Emphasis added.]

Id. at 5.

Senator Barrett stated at the hearing that the Senate committee "had a committee print set up which followed the language recommended by the Secretary of the Interior," id. at 6, and the language of the April 23, 1954, committee print corresponds to that proposed by the Department.

The only discussion of this provision that occurred at the Senate committee's May 12, 1954, hearing was the following among Senator Barrett, Gullickson, and Lewis Hoffman, Chief of the Mineral Division of the Bureau of Land Management:

> Mr. Gullickson [concluding his remarks quoted above]. That amendment is designed to remedy that inequity which now exists between those two classes of leases.

> Senator Barrett. It puts a noncompetitive lease within a unit on a par with another lease on which production has been encountered; is that right?
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> Mr. Gullickson. Yes. For example, on a type of Federal lease such as a 20-year lease, if production is encountered anywhere in the unit it will keep such a lease alive.
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> Senator Barrett. I should have qualified, the noncompetitive lease in the same unit. They are both protected in the same fashion.
>
> Mr. Gullickson. That is right.
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> Mr. Lewis E. Hoffman (Chief, Minerals Division, bureau of Land Management). It keeps those leases alive which are in their second 5-year extended term. The present law being that they would terminate.

Hearing, supra at 22-23.

It should be noted that Gullickson began his testimony with the following statement:

> We have had an opportunity in recent days to examine carefully the report and recommendations by the Secretary of the Interior to this Senate committee with respect to 2380, and we are prepared to say that we are entirely in accord with the analysis and views expressed in the Interior Department's report.

Hearing, supra at 20.

After the hearing, at the request of Senator Barrett, Hoffman filed a report explaining the Department's proposed consolidated bill. This report begins by referring to the proposed substitute attached to Assistant Secretary Wormser's April 20, 1954, report for "[the] language of proposed amendments."

Curiously, however, the explanation itself reverts to the word "discovery" instead of "production" as the event within a unit plan that would extend 5-year leases committed to a unit:

> (4) Section 17 (b), paragraph 4, sentence 2. -- Under present law, leases committed to an approved unit plan of operation are extended beyond the 5-year term and coextensive with the life of the unit plan if oil and gas is discovered under the plan. This extension is limited to leases in their first 5-year period. If discovery is made beyond the 5-year period, such leases do not get the benefit of being committed to a unit plan and a discovery in such unit plan. The proposed amendment would extend all leases, whether in their primary term or secondary term, or of whatever nature they are committed to an approved unit plan of operation, upon discovery of oil and gas anywhere within the boundaries of such plan. Also, this amendment would provide for segregation of any portion of a lease not committed to the plan, and such segregated portion would be extended for at least 2 years after segregation to enable the lessee for the lands outside the unit plan to drill and, if he discovers oil or gas in paying quantities, it would continue indefinitely as long as oil or gas is produced.

Hearing, supra at 40.

This language was incorporated into both the Senate and House reports on the bill. See H.R. Rep. No. 2238, 83rd Cong., 2d Sess. at 4, reprinted in 1954 U.S. Code Cong. & Ad. News 2695 at 2698; S. Rep. No. 1609, 83rd Cong., 2d Sess. at 3. Also included in the Senate and House reports was Assistant Secretary Wormser's April 20, 1954, report with its proposed substitute language.

During the debate on the bill Senator Barrett made the following statement concerning this provision:

> Under present interpretation of the law noncompetitive leases in a unit will be extended if production is encountered in the unit during the first 5 years of the lease. Under this provision all leases within the unit will be extended during the secondary term, when production is encountered within the unit * * *.

100 Cong. Rec. 10035 (July 8, 1954).

There are several possible explanations for the inconsistency in the legislative history of this provision. Most plausible is that Hoffman's explanation submitted to the Senate committee after the hearing mistakenly employed the language of the 1946 Act rather than the Department's proposed amendment of that language that was adopted by the committee. It is possible that the use of "discovery" was intentional, since Hoffman told the committee that his report would be "on the suggested changes with which we go along with the industry." Hearing, supra at 39. The fact that Hoffman's report begins by referring to the language of the April 20 substitute bill makes this unlikely, however.

In any event, our conclusion is that it is the language of the Act that must control, not only because the majority of the references in the legislative history are to "production" rather than "discovery" but more importantly because "Congressmen typically vote on the language of a bill." United States v. Locke, supra at 95. Our conclusion that the Congress replaced the 1946 discovery standard with a production standard does not contravene the congressional purpose of liberalizing the provisions of the Mineral Leasing Act in 1954, however. That liberalization was effected by allowing an extension

of a lease committed to a unit after its primary term. Thus, the 1954 amendment liberalized the 1946 provision by providing that a unitized lease would be extended by unit production at any time during the term of the lease, rather than only by a discovery during its primary term.

The words "production" and "discovery" are not used interchangeably in the Mineral Leasing Act, and it is important to maintain a difference in their meanings. 30 U.S.C. § 226(d) (1982) requires a lessee to pay annual rental of $.50/acre for a lease until "a discovery of oil or gas in paying quantities," after which a minimum royalty of $1 per acre in lieu of rental is due. Both competitive and noncompetitive leases are conditioned upon payment of a royalty of 12-1/2 percent in amount or value "of the production removed or sold from the lease" under 30 U.S.C. § 226(b) and (c) (1982) respectively. Section 226(f) addresses the circumstances under which a lease subject to termination "because of cessation of production" may be terminated. That subsection also provides that a lease on lands on which "there is a well capable of producing oil or gas in paying quantities" shall not "expire" for failure to produce unless the lessee does not place the well in producing status within 60 days of notice to do so or unless, having done so, "production is discontinued" without the Secretary's permission. If "discovery" were interpreted as tantamount to "production" a lessee could pay the minimum royalty of $1/acre rather than 12-1/2 percent of the value of the oil or gas he removed, for example, or could hold a lease simply by having a well capable of production on it. Neither of these possibilities conforms to the structure of the Act, however, and we will not construe "production" in section 226(j) in a manner that would undermine that structure.

[1] If Congress had intended for petitioners' leases to be extended by discovery instead of by production, Congress would have employed language in the law to give effect to such an intent. In 30 U.S.C. § 187a (1982), for example, Congress expressly provided that certain leases created by a segregation resulting from a partial assignment could be extended by a discovery. This provision was first introduced by the 1946 amendments of the Mineral Leasing Act, the same amendments which provided that a unitized lease could be extended for the life of a plan if there were discovery under the plan before the end of the primary term of the lease. If the 1954 amendments had left intact the discovery requirement for unitized leases as they did for assigned leases, the result in this case might well be different. Given the fact that the word "production" was substituted for "discovery," however, and given the absence of any basis in the structure of the Act to support the notion that these terms can be used interchangeably wherever they appear, we conclude that for a lease committed to a unit to be extended, there must be production of oil and gas in paying quantities on that unit. 5/

It is clear that neither of the production requirements of subsections 226(e) and (j) can be satisfied merely by the presence of a well capable of

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5/ 43 CFR 3107.3-1; see 43 CFR 192.122(b) (1954). If any doubt remains as to whether a "discovery" or "production" standard should be applied, the following observation from our decision in Celsius, 99 IBLA at 75-76, 94 I.D. at 407, is pertinent:

"In resolving the perceived ambiguities, we must remember that the 1954 amendments to § 226(j) were among several changes in the Mineral Leasing Act made by Congress at that time. The general intent of those amendments was 'to close all possible loopholes in the administration of the law * * *, such as, for example, a possibility that a lessee might avoid production requirements * * *.' H. Rep. No. 2238, supra, reprinted in 1954 U.S. Code Cong. & Ad. News, supra at 2696."

production because when Congress repealed the discovery requirement of section 226(j) and replaced it with a production requirement in 1954, the same statute added the provision of section 226(f) referred to previously governing the tenure of a lease in which there was no actual production but only a well capable of production:

> No lease issued under this section covering lands on which there is a well capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same unless the lessee is allowed a reasonable time, which shall be not less than sixty days after notice by registered or certified mail, within which to place such well in producing status or unless, after such status is established, production is discontinued on the leased premises without permission granted by the Secretary under the provisions of this chapter.

Act of July 29, 1954, supra, as amended, 30 U.S.C. § 226(f) (1982). If a production requirement could be satisfied by anything less than actual production, the foregoing provision would be superfluous. Petitioners' suggestion that a discovery should be sufficient to extend a unitized lease under section 226(j) would have this effect, contrary to the structure of the statute.

[2] Although section 226(f) does not expressly refer to unit wells on unitized leases, cf. 30 U.S.C. § 226(e) (1982), we have no reason to doubt that unitized leases were intended to enjoy the benefit of this provision. After referring to the various provisions under which leases could be held beyond their expiration dates, including production under section 226(e) and a well capable of production under section 226(f), the Solicitor commented on the applicability of these provisions to unitized leases:

> Section 17(j) of the Act, 30 U.S.C. § 226(j), allows leases to be combined under unit, cooperative, or communitization agreements. Leases committed to these agreements are subject to the same requirements as regular leases, that is, the leases expire at the end of the primary term unless they qualify for a statutory extension or unless actual production or a well capable of production in paying quantities exists at the end of the primary term. The difference is that production or a well capable of production, under the terms of the unit, cooperative, or communitization agreement satisfies the requirements for all committed leases regardless on which lease (or non-Federal property) the well is located. 30 U.S.C. § 226(j). [Emphasis added.]

Solicitor's Opinion, Oil and Gas Lease Suspension, 92 I.D. 293, 294-95 (1985). The Board's decisions concerning section 226(j) are consistent with this statement, and a unitized lease will not expire for lack of production at the end of its term if there is a unit well capable of producing oil or gas in paying quantities. See Yates Petroleum Corp., 67 IBLA at 249, 89 I.D. at 482; Burton/Hawks, Inc., 47 IBLA 125 (1980), aff'd, Burton/Hawks, Inc. v. United States, 553 F. Supp. 86 (D. Utah 1982); Corrine Grace, 30 IBLA 296 (1977). 6/

There is no suggestion that these leases were extended by actual production under the unit, nor may the leases be extended by drilling activities

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6/ In Yates Petroleum Corp., 67 IBLA at 249, 89 I.D. at 482, we stated:

"[T]he presence of a well capable of producing oil or gas in paying quantities completed anywhere in the unit, subsequent to the effective date of the unit agreement but prior to the expiration date of a unitized lease, will continue that lease beyond its primary term. Burton/Hawks, Inc., 47 IBLA 125 (1980); Corrine Grace, 30 IBLA 296 (1977)."

In Grace we said that "at a minimum" extension under section 226(j) "requires the successful completion of a well capable of producing unitized substances." 30 IBLA at 300. In Burton/Hawks we granted the appellant's request for a hearing to demonstrate the wells were capable of producing. Although the decisions do not expressly refer to section 226(f), they would not be correct if that provision did not apply to leases unitized pursuant to section 226(j).

under section 226(e) because they had already enjoyed one such extension and were not eligible for another. See Enfield v. Kleppe, 556 F.2d 1139 (10th Cir. 1977). Nor did the lessees seek a suspension under sections 209 or 226(f). Thus, unless the well at issue was capable of production within the meaning of section 226(f), BLM properly held that the subject leases expired.

The meaning of the phrase "well capable of production" has been clearly established for at least 30 years. After quoting from H. K. Riddle, 62 I.D. 81 (1955), the Solicitor observed in United Manufacturing Co., 65 I.D. 106, 113 (1958):

> It is quite apparent that the Department has construed the phrase "well capable of producing" to mean a well which is actually in a condition to produce at the particular time in question. This accords with the literal meaning of the phrase and is therefore adopted as the proper meaning of the phrase as used in the automatic termination provision.

The automatic termination provision to which the decision refers is codified at 30 U.S.C. § 188(b) (1982) and was also enacted as a part of the Act of July 29, 1954, that contained the provisions of 30 U.S.C. § 226(f) quoted earlier. United Manufacturing makes it clear that a well is not in physical condition to produce if the casing has not been perforated. Id. at 114-15. This rule was followed in Arlyne Landsdale, 16 IBLA 42 (1974). See also Hancock Enterprises, 74 IBLA 292, 294 (1983).

Petitioners acknowledge that the Dirty Devil 22-27 well had not been perforated and was not physically capable of producing before August 17, 1984.

Although this well might have qualified the segregated portion of a lease for an extension under the discovery standard in 30 U.S.C. § 187a (1982), see Joseph I. O'Neill, Jr., 1 IBLA 57 (1970), it cannot qualify a unitized lease under section 226(j).

We cannot accept petitioners' arguments that requiring a well physically capable of production to extend unitized leases will discourage exploration during the later months of such leases and encourage careless efforts to complete wells before the leases terminate. Neither consequence can be excused if lessees plan their activities well before the established expiration dates; if they do not, they must console themselves.

Dirty Devil contends that our decision disregards the clear terms of the unit agreement which provides that the agreement shall automatically terminate 5 years from its effective date unless a valuable discovery of unitized substances in paying quantities has been made. Petitioners cite repeated references to the word "discovery" in the unit agreement, and contend that the language of the unit agreement ought to govern the construction of the statute. Dirty Devil contends that it is anomalous to assert that the discovery of unitized substances in paying quantities is enough to extend the unit agreement past its expiration date, but is insufficient to similarly extend an individual lease committed to a unit.

We see no anomaly. The provisions of 30 U.S.C. § 226(j) (1982) both establish and limit this Department's authority with respect to unit

agreements; the Department cannot by contract exceed the scope of authority conferred by the statutory provision. The agreements must be subject to the statute; the construction of the statute cannot be subject to the agreements. Although a discovery may extend the life of the agreement pursuant to the agreement's provisions, it does not extend the life of the leases because the terms of the leases are governed by the statute and the statute requires production. In Corrine Grace, supra, the Board made repeated acknowledgements of the existence of the word "discovery" in the unit agreements, yet recognized that the statute requires, at a minimum, a well capable of producing oil or gas in paying quantities in order for the leases committed to a unit to be extended. As we noted above, this requirement cannot be met without perforation of the casing.

Petitioners contend that the "'perforated casing rule' leads to inequitable and absurd results" (Petition at 10). Dirty Devil cites a BLM decision, Richard M. Ferguson, Riverside 0540 (June 5, 1963), in which BLM determined that the fact that oil was flowing around the casing of a well did not prevent the well from being deemed "in production" prior to the expiration of a lease. The decision held that "the cementing of the casing [after the expiration date] is considered as repairing, not completing the well." Id. at 2. In this respect, Ferguson is wrongly decided. As we indicated above, an individual lease can be extended only by actual production, not by a well capable of production. Compare 30 U.S.C. § 226(e) (1982) with § 226(f). The Ferguson decision missed this important distinction. Of course, if the well had been capable of production, 30 U.S.C. § 226(f) (1982) would have prevented the lease from expiring. The difficulty with the Ferguson decision,

however, is that the well at issue would not have been deemed capable of production under Departmental precedents which BLM failed to follow. See United Manufacturing Co., supra. Ferguson was a BLM decision, so it does not carry the authority of Departmental precedents. In any event, Ferguson was reversed on appeal to the Secretary. Richard M. Ferguson, A-30090 (Sept. 22, 1964). We have previously observed: "[T]his Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates." Pathfinder Mines Corp., 70 IBLA 264, 278, 90 I.D. 10, 18 (1983), aff'd, Pathfinder Mines Corp. v. Clark, 620 F. Supp. 336 (D. Ariz. 1985), aff'd, 811 F.2d 1288 (9th Cir. 1987).

Dirty Devil contends that an extension was required pursuant to paragraph 25 of the Dirty Devil unit agreement which provides for a suspension of obligations contained in the unit agreement for the period during which the unit operator is prevented by a force majeure from meeting such obligations. Appellant contends that it was prevented by natural causes from installing a well casing in the Dirty Devil well. Dirty Devil misunderstands the effect of this provision. For example, if there had been no discovery of unitized substances within the unit prior to the fifth year after the effective date of the agreement, the unit agreement would terminate pursuant to paragraph 2(c) as petitioners recognize. If a suspension under paragraph 25 were in effect on that date, however, the unit agreement would not terminate. The effect of such an event on the term of a unitized lease, however, depends on whether there has been production of unitized substances under the agreement prior to the expiration of the term of that lease. If so, the lease remains

in effect for so long as it remains committed to the unit plan. If not, the lease will expire unless it is suspended pursuant to 30 U.S.C. § 209 (1982), or is entitled to an extension pursuant to some other statutory provision. Dirty Devil has cited no other statutory provision for an extension, and does not assert that an application for a suspension was filed.

Finally, we must consider an allegation set forth at the beginning of Dirty Devil's petition:

> A critical fact absent from the IBLA's decision is that late on August 16, 1984, an official of the BLM present at the well site indicated to Hiko Bell personnel that there was no concern regarding expiration of the leases. Given this indication from the BLM official, Hiko Bell pursued completion of the well in a safe and prudent manner, even though they were aware that the well casing would not be perforated prior to midnight. However, according to Robert W. Covington, officer and exploration manager for Hiko Bell, Hiko Bell could have and would have undertaken extraordinary measures to install and perforate the well casing prior to midnight, absent the indications from the BLM official that such steps were not necessary.

(Petition for Reconsideration at 2). Dirty Devil neither identifies the official nor explains the form or manner by which he "indicated * * * that there was no concern regarding expiration of the leases." Appellants do not allege that the BLM official affirmatively made this statement to them, or whether the alleged indication was nothing more than an inference drawn by the operator. The need for perforation of the casing, inter alia, to make a well capable of production is a requirement that is well established in Departmental practice and precedent. If a BLM official indicated otherwise, he acted beyond his authority in doing so.

[3] This issue was presented in Burton/Hawks v. United States, supra, when the plaintiff contended that the Department's district engineer had agreed that drilling operations within a unit would prevent a lease from terminating at the end of its primary term. The plaintiff contended that it detrimentally relied on the district engineer's assurances. The court held: "The weakness of plaintiff's position is apparent, after even a cursory examination of the relevant statutory and case law." Id. at 92. After quoting Departmental regulation 43 CFR 1810.3, the court further held:

> Section 1810.3 establishes the principle that plaintiff's reliance on the erroneous statements of the district engineer could not estop the IBLA from denying a two-year extension of the lease where the lease did not qualify for the extension under the terms of the agreement or the MLLA [Mineral Lands Leasing Act] The proposition that the erroneous statements of its employees do not bind the United States is well accepted in the case law. E.g., Federal Crop Ins. v. Merrill, 332 U.S. 380, 384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947); United States v. California, 332 U.S. 19, 39, 67 S.Ct. 1658, 1668, 91 L.Ed. 1889 (1947); Clair R. Caldwell, et al., 42 IBLA 139, 141 (1979); Paul S. Coupey, 35 IBLA 112, 116 (1978). Thus, despite plaintiff's reliance on assurances made by the USGS district engineer, the IBLA was free to reach an independent decision on whether or not the lease expired by operation of law.

Id.

Although a majority of the Supreme Court have acknowledged that the Government may be estopped upon a showing of "affirmative misconduct," among other things, we are not aware of any case in which the Court has found affirmative misconduct, even where the circumstances for making such a finding were far more compelling than those asserted by appellant in the instant appeal. See Heckler v. Community Health Services of Crawford County, Inc.,

451 U.S. 51 (1984); Schweiker v. Hansen, 450 U.S. 785 (1980); see also Phelps v. Federal Emergency Management Administration, 785 F.2d 13 (1st Cir. 1986).

Although petitioners complain about the arbitrariness of BLM's decision, it is merely the result of the arbitrariness inherent in any deadline. See United States v. Locke, supra at 94; United States v. Boyle, 469 U.S. 241, 249 (1985). Petitioners or their predecessors-in-interest have held these leases for many years during which the production requirements of the Mineral Leasing Act could have been satisfied. The particular date at issue was known 2 years in advance. Thus, the arbitrariness of which petitioners complain results from no act of BLM but must be attributed to the timing of lessees' activity shortly before the expiration date of these leases. When a landowner agrees to a mineral lease, he does so with the expectation of receiving a production royalty for the deposits which underlie his land. While the typical oil and gas lease contains a number of provisions under which satisfaction of this expectation might be delayed, the lease also contains specific deadlines that may be enforced. Such provisions are

> not subject to the familiar rule that forfeitures are viewed with disfavor and will be enforced only when circumstances require it. The courts have held that in connection with oil and gas leases, forfeitures are favored by the law so that such leases are to be construed liberally in favor of the lessor and provisions for forfeiture strictly enforced.

KernCo Drilling Co., 71 IBLA 53, 58 (1983), citing Bert O. Peterson, 58 I.D. 661, 666 (1944), aff'd, Peterson v. Ickes, 151 F.2d 301 (D.C. Cir.), cert. denied, 326 U.S. 795 (1945); see also 38 Am. Jur. 2d Gas & Oil, § 99 (1968).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petitions for reconsideration are granted and our prior decision in this case is sustained as modified.

_____
Will A. Irwin
Administrative Judge

We concur:

_____
Franklin D. Arness
Administrative Judge

_____
Wm. Philip Horton
Chief Administrative Judge